United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7307

To be argued by
MARK C. RUTZICK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AL DAYON, individually and on behalf of MASTERCRAFT ELECTRONICS CORP.,

Plaintiff-Appellant,

-against-

THE HONORABLE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, THE HONORABLE HAROLD A. STEVENS, THE HONORABLE THEODORE R. KUPFERMAN, THE HONORABLE GEORGE TILZER, THE HONORABLE AARON STEUER and THE HONORABLE EMILIO NUNEZ, Justices of the Supreme Court of the State of New York, Appellate Division, First Department, THE HONORABLE VINCENT A. MASSI, Justice of the Supreme Court of the State of New York, New York County, DOWNE COMMUNICATIONS, INC., EDWARD R. DOWNE, JR., WILLIAM H. KEHL, as Sheriff of the City of New York and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES THE SUPREME COURT OF THE STATE OF NEW YORK, STEVENS, KUPFERMAN, TILZER, STEUER, NUNEZ AND MASSI

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Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Hon. Robert J. Ward, U.S.D.J.), dated April 22, 1975 dismissing the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of jurisdiction over the subject matter, upon the motion of the defendants-appellees Justices of the Appellate Division of the Supreme Court of the State of New York, First Department.

Question Presented

Does the District Court have subject matter jurisdiction over an action seeking review of state court orders and a state court judgment?

Statement of the Case

This frivolous federal action stems from plaintiff-appellant's dissatisfaction with the adjudication by the defendant-appellee Justices of an earlier action brought by the

plaintiff in the Supreme Court of the State of New York. In that action, plaintiff had obtained a pre-judgment order of attachment under Article 62 of the New York Civil Practice Law and Rules in the sum of $2,000,000 against two of the defendants therein, Downe Communications, Inc. and Edward Downe (Appendix 57, 58). The defendants there twice moved to vacate that order of attachment (A. 106, 109) which motions were denied in a Special Term of the Supreme Court of the State of New York (A. 112). The defendants appealed that denial to the Appellate Division of the Supreme Court of the State of New York (A. 129) which reversed and granted the motions to vacate the order of attachment (A. 134-136). The Appellate Division denied leave to appeal to the New York Court of Appeals (A. 139-140). The plaintiff nevertheless prosecuted an appeal to that Court, which was dismissed (A. 141).

The plaintiff then experienced further ill-fortune in his state court action. Upon a motion by a number of the defendants therein, Justice Vincent A. Massi of the Supreme Court of the State of New York dismissed the complaint with leave to the plaintiff to serve an amended complaint within

30 days on the ground that the allegations in the complaint were so vague and ambiguous that none of the defendants could reasonably be expected to answer (A. 172-176). The plaintiff declined to amend his complaint (Comp., ¶ 112) and instead chose to appeal Justice Massi's order to the Appellate Division (Comp., ¶ 116). Upon the plaintiff's failure to amend the complaint, however, Justice Massi subsequently entered a judgment dismissing the complaint without conditions (Comp., ¶ 114). The Appellate Division then declined to review the conditional dismissal order on the ground that it had been superseded by the final judgment of dismissal (Comp., ¶ 118). No appeal was ever taken from Justice Massi's final order of dismissal, as far as appears from the Complaint or Appendix.

In the within federal action against, inter alia, the Justices of the Appellate Division panel which granted the motion to vacate the order of attachment and Justice Massi* the plaintiff seeks the following relief: (1) judgment "annulling" the order of the Appellate Division granting the motion to vacate the order of attachment; (2) judgment declaring that the plaintiffs' state court complaint states a cause of action

* Justice Massi deceased on April 24, 1975.

against Downe Communications, Inc. and declaring the original order of attachment valid; (3) judgment declaring the state court complaint sufficient as a matter of law and (4) judgment "annulling" all actions and proceedings "by any defendant" based upon the Appellate Division's order granting the motion to vacate the order of attachment. The mere statement of the relief sought demonstrates the effrontery of this action against the Appellate Division Justices and the deceased Justice Massi. Nevertheless we shall discuss it.

ARGUMENT

THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION BECAUSE THE ACTION SEEKS REVIEW OF STATE COURT DECISIONS RELATING SOLELY TO STATE LAW AND FAILS TO STATE ANY CLAIM COGNIZABLE UNDER THE CIVIL RIGHTS ACT.

This action consists of nothing more than an effort to obtain review in the United States District Court of the orders of the Appellate Division and the Supreme Court of the State of New York despite the fundamental jurisdictional fact that the District Court has no appellate jurisdiction over the decisions of the state courts.

Each of the fourt prayers for relief in the complaint seeks to overturn and reverse decisions adverse to the plaintiff-appellant rendered in his state court proceeding. As to the Appellate Division, plaintiff-appellant seeks reversal of its order granting the motion to vacate the attachment order. As to Justice Massi, the plaintiff-appellant seeks a declaratory judgment that his state court complaint states a cause of action, reversing Justice Massi's order dismissing the complaint.*

While the plaintiff-appellant, with good reason, seeks to deny the obvious import of his complaint by claiming some sort of violation of his constitutional rights by the actions of the Justices (Pl.-App.'s Brief at 15), his discussion of the substance of his four claims demonstrates the true nature of the relief he seeks. His entire argument concerning the decisions he is challenging is predicated solely upon New York law (See Pl.-App.'s Brief at 15-28). All he ever attempts to show is that the challenged decisions were in error under the statutes and case law of the State of New York. Plaintiff-appellant cannot cite even one federal or state case suggesting that the errors of state law alleged herein constitute a denial of a constitutional right.

* Even though the Attorney General received no request prior to the death of Massi to represent him in this action, in the interest of justice and the convenience of the Court, arguments in support of dismissing the complaint as against him will be presented.

The plaintiff-appellant's inability to support his claim is with good reason. More than 50 years ago the Supreme Court of the United States held in Rooker v. Fidelity Trust Company, 263 U.S. 413 (1923), that the District Courts lacked jurisdiction to entertain actions based upon alleged errors by state courts. In that case the plaintiff, also the plaintiff in an action in the Indiana Circuit Court, sought to void an adverse decision by that court, claiming it was in contravention to the contract clause of the Constitution and in error under Indiana law. The Supreme Court held that "no court of the United States other than this Court could entertain a proceeding to reverse or modify the [state] judgment for errors of that character. [citation omitted]. To do so would be an exercise in appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original." Id. at 416.

In Adkins v. Underwood, 520 F. 2d 890 (7th Cir. 1975) a litigant brought an action in the United States District Court claiming that a decision by the Illinois Supreme Court granting her state court opponent's forum non conveniens motion violated her rights under the due process clause and the privilege and immunities clause of the Constitution. The Court of Appeals affirmed the District Court's dismissal of the complaint, stating:

> "At the outset we note that if plaintiffs are permitted to bring suits of this ilk under the guise of the civil rights statutes,

> the relationships between state and federal courts will be radically altered. Plaintiff is asking a inferior federal court to order the Supreme Court of Illinois to vacate its judgment and reinstate a favorable trial court verdict and judgment. Granting such relief would interfere with discretion at the heart of the state court decision-making process, jeopardizing the repose of state court judgments as well as offending firmly-held notions of comity." Id. at 181-193.

The Court then rejected the plaintiff's due process and privilege and immunities claims. The Court took note that the plaintiff had failed to seek certiorari in the Supreme Court of the United States for review of her constitutional claims. Id. at 892.

In Atchley v. Greenhill, 517 F. 2d 692 (5th Cir. 1975), cert. denied, ____U.S.____, 96 S. Ct. 452 (1975), a litigant sought a declaration from the United States District Court in an action under 28 U.S.C. § 1983 voiding state court rulings adverse to the litigant. No petition for a writ of certiorari had been filed with the Supreme Court of the United States. The Court of Appeals affirmed the District Court's dismissal of the complaint for lack of subject matter jurisdiction, citing, inter alia, Rooker, supra. See Lektro-Vend Corp. v. Vendo Company, 403 F. Supp. 527, 529, n.1(N.D. Ill. 1975).

"[L]ower federal courts possess no power whatever to sit in direct review of state court decisions." Atlantic C.L.R.Co. v. Engineers, 398 U.S. 281, 296 (1970). "The proper procedure for [a litigant] to follow in order to vindicate what [he] asserts to be [his] constitutional rights was to appeal the decision of the state courts to the Supreme Court." Louis Ender, Inc. v. General Foods Corporation, 467 F. 2d 327, 332 (2nd Cir. 1972). In the within case the plaintiff-appellant declined to seek to vindicate by appeal the rights he claims were violated by the Appellate Division. He never petitioned the Supreme Court of the United States for a writ of certiorari in relation to any aspect of his state litigation. If the Appellate Division's order did offend any constitutional right, the Supreme Court of the United States is conferred with ultimate appellate jurisdiction to reverse that order.* Rooker, supra; Tang v. Appellate Division of

* While United States Supreme Court review of the Appellate Division's order granting the motion to vacate the order of attachment is not immediately available under 28 U.S.C. § 1257 because of its non-finality, the absence of immediate review does not give rise to a cognizable claim against the Appellate Division, nor confer jurisdiction upon the District Court. There is no constitutional right to obtain immediate appellate review of interlocutory or non-final orders. The rules of New York and the federal courts both place severe limits upon rights of interlocutory appeals for the obvious purpose of permitting orderly and expeditious litigation of matters at the trial level. Appeal following entry of a final judgment in the state litigation would have allowed review of all material constitutional claims.

New York Supreme Court, First Department, 487 F. 2d 138 (2nd Cir. 1973); Superintendent of Ins. of N.Y. v. Bankers L. & Cas. Co., 401 F. Supp. 640, 650 (S.D.N.Y. 1975); Wisnoski v. Weihing, 396 F. Supp. 1358 (E.D. Wis. 1975). There is of course no federal constitutional right to pre-judgment attachment. To the contrary, the United States Constitution apparently operates to limit the scope of pre-judgment attachment procedures. See Carey v. Bert Randolph Sugar and Wrestling Revue, Inc., ____U.S.____, 44 U.S.L.W. 4416 (March 24, 1976).

Plaintiff-appellant's claims concerning the dismissal of his state court action by Justice Massi are even further removed from federal cognizance. Neither the complaint nor the record shows that he ever obtained one level of state appellate review of Justice Massi's final judgment dismissing the complaint.* After the Appellate Division declined to review the conditional dismissal order on the quite reasonable ground that it had by then been superseded by the final dismissal

* Nor, of course, did plaintiff-appellant make any effort to amend his complaint in the face of Justice Massi's conditional dismissal order.

judgment, the plaintiff-appellant, as far as the complaint or record shows, simply ceased litigating that proceeding. All of plaintiff-appellant's constitutional claims could have been presented to the New York courts, and ultimately, if necessary, to the Supreme Court of the United States, by the normal route of appellate review. If plaintiff-appellant believed his original complaint did state a cause of action, appellate review would have given him a conclusive determination under New York law. But instead, plaintiff-appellant "made no effort to utilize orderly state court procedures before resort to the federal system... .A party may not invoke the aid of a federal court, alleging that his state remedies are inadequate, without having first tested the sufficiency of those remedies and having found them to be wanting." Duke v. State of Texas, 477 F. 2d 244, 252 (5th Cir. 1973). Plaintiff-appellant's failure to amend the complaint when invited and his failure to obtain appellate review of the soundness of the original complaint establish that any injury suffered from the dismissal of that complaint is wholly of his own doing.*

* Plaintiff's counsel informed the Attorney General, on June 4, 1976, that he did make some efforts to obtain review of Justice Massi's final judgment, and that his direct appeal to the New York Court of Appeals was rejected as unauthorized, and his appeal to the Appellate Division was rejected as untimely. In the event the Court wishes to consider these facts, which are plainly dehors the record, it seems rather apparent that plaintiff's inability to obtain appellate review was due to his own failure to follow the rules of New York appellate practice rather than to any constitutional defect in that practice.

Plainly, the claims in the within action lack the substantiality sufficient to support jurisdiction in a single-judge district court, let alone a three-judge court*. Prior decisions by the Supreme Court of the United States "inescapably render the claims frivolous", Goosby v. Osser, 409 U.S. 512, 518 (1973); Hagans v. Lavine, 415 U.S. 528, 538 (1974).

The District Court had no jurisdiction over the subject matter of the within complaint, and properly dismissed the complaint for that reason.

CONCLUSION

THE ORDER OF THE DISTRICT COURT DISMISSING THE COMPLAINT FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER SHOULD BE AFFIRMED WITH COSTS.

Dated: New York, New York
June 8, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
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* Plaintiff-appellant's references to the necessity for a three-judge court are difficult to comprehend, because nowhere in his complaint does he allege any circumstance in which he was injured by the operation of a New York statute, or give even the slightest reason to weigh the constitutionality of any such statute.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROSALIN SMALLS , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Defendants herein. On the 9th day of June , 1976 , she served the annexed upon the following named person :

CHARLES SUTTON, ESQ.
299 Broadway
New York, N.Y. 10007

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Rosalin Smalls
ROSALIN SMALLS

Sworn to before me this
9th day of June , 1976

Assistant Attorney General
of the State of New York